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NO. 2773

# In the United States Circuit Court of Appeals

## For the Ninth Circuit

MAINE NORTHWESTERN DEVELOPMENT COMPANY, a Corporation,

*Appellant,*

vs.

NORTHWESTERN COMMERCIAL COMPANY, a Corporation,

*Appellee.*

BRIEF FOR APPELLEE.


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## STATEMENT.

This is an action at law to recover from the appellee upon an alleged contract of subscription to the preferred capital stock of the appellant. Appellant was organized in March, 1906, under the laws of the State of Maine. The appellee, which is a corporation organized under the laws of the State of

Washington, had been engaged in business in Seattle, Washington, and Alaska for a number of years prior to 1906. It conducted a mercantile business in Nome, Alaska, and owned all of the capital stock of the Northwestern Steamship Company, a corporation engaged in carrying freight and passengers between Puget Sound and Alaska, and also owned the capital stock of the North Coast Lighterage Company, engaged in the business of lightering cargo from ships' tackles to shore at Nome, Alaska. John Rosene was president of the appellee company. It appears from his testimony that he was also more or less active in other business lines and speculations of his own. In November or December, 1905, and January, 1906, Rosene had been approached by one L. H. French in the endeavor to interest him in a scheme to sell a large number of so-called mining claims in Alaska, in which French appears to have been interested, and also to finance some railroad schemes in Alaska which French was trying to float. It appears from Rosene's testimony that he did become interested in French's schemes either before or very soon after he reached New York in January or February of 1906. Rosene took the matter up with one A. A. Hauseman, who was a private banker on Broad Street, New York, being the head of the firm of A. A. Hauseman & Co., and who was apparently an intimate acquaintance and associate of Rosene. Through Hauseman, certain

parties representing or purporting to represent English capital were interested in the scheme, and it was finally agreed that a corporation would be organized by Rosene and Hauseman and their associates to take over these properties and construct a railroad. In the meantime, it had been agreed by the owners of the mining property that they would sell the property to the company for $245,000, cash. French, apparently, had some interest in the mining property, although the record does not make it very clear as to what his interest was. Apparently, he was representing all of the mine owners in an endeavor to make a sale of the claims as a whole, probably on a basis of a commission. At any rate, it was agreed between all the parties that the new company to be organized would buy the mining properties and water claims for a consideration of $245,000. (Record, pp. 127-8.) Rosene claims that he had no real interest in the mining properties, although it appears from his testimony that either prior to the time he went to New York or very soon after reaching there and before the plan for organizing the appellant corporation had been made, he had paid French $20,000, either for an interest in the mining claims or for a share in the profits which French was making by negotiating the sale. (Record, p. 162.)

Rosene, Hauseman and their associates thereupon proceeded to organize the appellant corporation. It was organized with a capital stock of $6,250,000, di-

vided into $2,500,000 of preferred stock and $3,750,000 of common stock. Rosene agreed to subscribe $250,000 on behalf of the appellee corporation to the preferred stock of the appellant, and also agreed to subscribe $50,000 upon his own behalf, personally. Hauseman also agreed to subscribe for $50,000 of the preferred stock. Rosene, Hauseman and French, as promoters of the appellant corporation, agreed among themselves that they would divide up among themselves $1,250,000 of the common stock as a bonus, and that the balance of the common stock would be placed in the treasury and issued as a bonus to subscribers to the preferred stock. When they came to organize the corporation, according to Rosene's testimony, one McConnell, who seems to have been the real representative of the majority of the owners of the mining property, refused to accept the obligations of the proposed corporation for the $245,000, but was willing to accept Rosene's personal obligation; and Rosene claims that the various mine owners conveyed all of the interest in the mining property to him, and that he immediately conveyed it to the corporation, and that this was done because of the insistence of McConnell that he must have Rosene's personal obligation for the $245,000. (Page 129.)

It further appears from the testimony of Rosene that the lawyers who were managing the organization of the appellant corporation advised that it was neces-

sary to have the corporate resolutions recite that the consideration for the mining property was $245,000 in cash and $3,750,000 of the common stock; it being explained, as Rosene claimed, that this was necessary in order to enable them to distribute the common stock as a bonus in the manner in which they had agreed among themselves. (Record, pp. 128, 131.)

A resolution was passed by the board of directors of the appellant company immediately after organization, authorizing the purchase of this mining property for the $245,000, cash, and the $3,750,000 common stock. There was a proposition made by Rosene to the company to convey the mining property, which was drawn along this theory that the purchase price of the mining property was $3,995,000. Rosene immediately gave back to the corporation an agreement that out of the $3,750,000 common stock received by him, he would turn back to the treasurer of the company $2,500,000 thereof, to be issued as a bonus by the company thereafter to subscribers to the preferred stock, and this was done. (See Exhibits Plaintiff's Minutes in March, 1906.) The remaining $1,250,000 common stock was deposited with A. A. Hauseman or A. A. Hauseman & Co., who held it under some kind of a pooling agreement between Rosene, Hauseman and French.

It is shown clearly by the testimony that at the time of the organization of the appellant company and

of the passage of the resolution by its board of directors for the purchase of this mining property for a consideration of $3,995,000, the board of directors was a board composed of Hauseman, French, Davis, Pierce and Rosene, all of whom either shared in the bonus or were representing the participants. None of them, except Rosene and French, had ever been to Alaska and, of course, had not seen any of the mining property, and never in fact undertook to place any valuation upon the property. (Record, p. 132.)

Soon after the organization of the appellant corporation, Rosene left New York, going first to San Francisco, from which place he seems to have forwarded to Hauseman a contract of subscription to the preferred stock of the appellant, signed by him on behalf of the appellee, for $250,000. He returned to Seattle soon thereafter, being early in April, 1906. The board of trustees of the appellee company at that time was composed of John Rosene, M. Thomsen, H. W. Treat, J. D. Trenholme, Captain D. H. Jarvis (since deceased), and one McLaren (since deceased). A few days before Rosene reached Seattle, Mr. Trenholme had heard from some friend of his that the appellant corporation had been organized and that Rosene had subscribed for $250,000 of its preferred stock on behalf of the appellee. Immediately upon the arrival of Rosene in Seattle, Trenholme, who was secretary of the appellee, secured a meeting of the trustees, having

in the meantime discussed the matter with both Thomsen, Treat and Jarvis. They had agreed among themselves that they would not permit Rosene to commit the appellee to any such subscription, and Mr. Treat had requested Mr. John P. Hartman, who was then the attorney of the appellee, to be present at this meeting for the purpose of drawing up proper resolutions repudiating the subscription. When the meeting convened, Rosene reported that he had made a subscription to the appellant's preferred stock on behalf of the appellee in the amount of $250,000, and had paid $50,000 thereon. Each and every member of the board of trustees present expressed dissatisfaction at this action. Mr. Hartman, upon the request of Mr. Treat, drew up a resolution repudiating the subscription, and this resolution was introduced and passed unanimously, Mr. Rosene himself not voting. Rosene thereupon importuned the board not to place the resolution upon its records, stating that the applications for the stock of the appellant company were far in excess of the amount of stock, and that he would immediately place the stock with other subscribers and would reimburse the company for the $50,000 which had been already paid. He was at that time managing director of the appellant company. He claimed that if the resolution of repudiation was actually spread upon the minutes of the appellee company it would discredit him in the business world. Mr. Treat thereupon asked Mr. Hart-

man, the company's attorney, whether the resolution as passed by the board would have the same legal effect if it was left off the records as if it were recorded, and Hartman advised that the legal effect would not be changed by omitting the resolution from the records. Thereupon, by unanimous consent of the board, the secretary was directed not to record the resolution. (Record, pages 80, 93, 104.) The exact date of this meeting does not appear in the records, for the reason that no minutes of the meeting were made, the passage of this resolution repudiating the subscription being the only business transacted; but it is clear from the testimony that this repudiation by the appellee's board took place some time early in April, 1906.

Within a very short time thereafter, Mr. H. C. Davis, who was a partner in the firm of A. A. Hauseman & Co. of New York and president of the appellant company, was in Seattle, and Mr. Trenholme, the secretary of the appellee company, reported to Mr. Davis that the appellee had repudiated this subscription, and that Rosene had no authority to make it. Nothing further came before the board of trustees of the appellee respecting this subscription until September 5, 1906. It then transpired that Rosene had not returned the $50,000 which had been paid by him out of the appellee's funds to the appellant and that an additional $25,000 of appellee's funds had been applied by Rosene without the knowledge of the board

toward this subscription. It appears that the appellant was shipping large quantities of merchandise from Seattle to Nome by the steamers of the Northwestern Steamship Company, owned by appellee, and in July was largely indebted to the appellee, either upon account of freights or upon advances made by Rosene on behalf of the appellee to the appellant. In this condition of the accounts, Rosene, without the knowledge of the board of appellee, instructed M. M. Perl, its auditor, to credit the appellant on its account with the appellee with the sum of $25,000, as of July 15, 1906, and charge to the account of the subscription. This direction of Rosene to Perl is shown by pages 106 and 113 in the Record.

In the transaction of its business in Alaska and Seattle, Rosene, who was the managing director of the appellant as well as the president of the appellee, permitted the representatives of the appellant in Nome to draw either on him or on the appellee at Seattle for large sums of money from time to time as they were needed by appellant, and the auditor Perl, under private instructions from Rosene, would pay these drafts out of the funds of the appellee, and charge them to the appellant's account. On August 31st, 1906, when the accounts were balanced, the appellant was indebted to the appellee in the sum of something over $57,000, in addition to the $50,000 which Rosene had paid in April, and the $25,000 which Perl, under his instruc-

tions, had credited to the appellant on July 15th. (See Exhibits "K" and "K-1.") When the board of trustees of the appellee met on September 5th, 1906, this was the condition of the accounts. A general discussion of the situation was precipitated, Rosene insisting that the appellee should become a subscriber to some amount of stock in the appellant company, while the majority of the board were opposed to taking any stock. The board finally agreed, in order to compose all of these disputes, that it would authorize the president to make a subscription to the preferred stock of the appellant in the amount of $125,000; it being understood and agreed that the moneys previously turned over to the appellant, that is, the $50,000 paid by Rosene in April, and the $25,000 credited in July, and $50,000 of the $57,000 still owing to the appellee from the appellant, as shown by the accounts as balanced on August 31st (see Exhibits "K" and "K-1"), should be applied in payment of the subscription thus authorized by the board. (Record, pp. 81-2, 95, 105-6.) It is shown by the testimony that Rosene, who was chairman of the board of directors of the appellant, assured the board of trustees of the appellee at that time that this would be accepted by the appellant in full adjustment and settlement of all disputes between them. Soon afterwards, that is, early in October, 1906, Rosene went to New York and at a conference with Hauseman, Henderson, Davis and Pierce (who with

Rosene constituted the board of directors of the appellant at that time), reported that he had practically forced the board of trustees of the appellee to agree to subscribe to $125,000 of the stock of the appellant, to be paid for by the application of the moneys as above set out, and that the appellee would not stand for the subscription made by him during the preceding March, and was authorizing this new subscription as a full settlement and disposition of the whole matter. Davis, Hauseman and the other directors of the appellant assented to this arrangement, stating to Rosene that other subscriptions made at the time of the organization had also been canceled and that this settlement was acceptable (Record, p. 134-5). While this meeting does not appear to have been a formal directors' meeting, it does appear that the conference took place in the directors' room of the appellant in the office of A. A. Hauseman & Co., and that the president and treasurer and all of the directors of the appellant (with the possible exception of one member) were present and assented to this adjustment.

In April, 1907, the appellee received a notice from the secretary of the appellant of an assessment of 10 per cent upon the original Rosene subscription. The appellee board of trustees thereupon passed another formal resolution directing its officers to notify the appellant that the appellee had never made any subscription to its capital stock, except in the sum of $125,-

000 (which, of course, referred to the subscription authorized in September, 1906), which had been fully paid, and that it was not indebted to the appellant in any sum whatever (Record, p. —). A copy of this resolution was transmitted by the secretary of the appellee to the appellant with a letter fully explaining appellee's position (Record, p. 107; Exhibit No. 3). No other claim was ever made by the appellant against the appellee on this subscription until the summer of 1910, after the death of both Davis and Hauseman. At that time the appellant made an assessment against the appellee and gave notice thereof. The appellee immediately, through its attorneys, by letter denied any indebtedness or liability to appellant, and again notified them that the appellee had promptly repudiated Rosene's subscription (Exhibit No. 2). Soon thereafter the appellant commenced suit against the appellee upon the alleged Rosene subscription and the appellee denied all liability. When the case came on for trial, after introducing some of its testimony, the appellant took a non-suit. Thereafter new proceedings were taken by appellant levying an assessment on the Rosene subscription, and this suit was instituted thereon.

One E. J. Matthews became the president of the appellant company in the year 1908. (Record, p. 76.) He testified that when he became president he was informed or knew that the appellee had or claimed

that it had repudiated the Rosene subscription. (Page 76.)

The record shows clearly and beyond any question of dispute that Rosene had no authority from the appellee to make the subscription, and that appellee immediately upon learning that he had made such a subscription repudiated it and has constantly denied liability from that time down to the present. When the case was tried in the court below, the trial judge instructed the jury in substance that Rosene had no authority to make the subscription and submitted to the jury the question whether the appellee had affirmed or repudiated the subscription either expressly or by its conduct; and also, in case they found that appellee had ratified the subscription, he submitted to them the further question whether the common stock which appellant had tendered in court to appellee had been paid in cash or property at a bona fide and fair valuation, as required by the Maine statutes. The verdict of the jury, of course, settles these questions of fact in favor of the appellee. No exception was taken by the appellant to these instructions. It claims that it requested a special instruction, No. 16, which was in part inconsistent with the general charge. The requested instruction is not brought up by the record, and therefore its correctness cannot be considered.

## ARGUMENT.

In discussing the questions involved, we will follow the assignments of error as found in the record, rather than the order of discussion followed by appellant in his brief, for the reason that we think appellant has discussed many questions that were not raised by his assignment of errors.

### I.

The first error assigned is the action of the Court in sustaining the objection of the appellee to the introduction in evidence by appellant of its Exhibits marked "E4," "E6," "E8," "E9," and "E10," Exhibit "E5" is also mentioned in the assignment of error, but the record shows that that exhibit was admitted in evidence.

The ruling of the Court covered by this assignment is found on Record, pp. 53 and 54. The exhibits referred to were letters passing between various officers of the appellant corporation transmitting documents or records from one to the other, and with which appellee was in no wise connected. The ruling was manifestly correct. The Court will also observe that no exception was taken by appellant to the ruling. Therefore, error cannot be predicated thereon.

### II.

The appellant offered in evidence the stipulation between the attorneys for the companies, dated May

11, 1914, relative to certain proposed amendments to the pleadings as they then stood (Record, pp. 69-70).

It will be noted that the document offered in evidence referred to the pleadings as they stood in 1914. Subsequent to that time, the complaint was amended and the amended answer was filed and the case was tried under the issues as made in these amended pleadings. This amended answer denied the issuance of this stock by the plaintiff to the defendant between the dates mentioned in the stipulation. The document offered in evidence, therefore, was not the pleading on which the case was tried, but a stipulation by counsel relating to previous pleadings, and at most amounted to merely an admission by counsel of a fact denied by the defendant in its subsequent pleadings.

It will be noted that the pleading as amended under the stipulation was not offered in evidence, and there is nothing in the record to indicate that the pleading of the defendant was in fact ever amended so as to contain the admission claimed to be contained in the stipulation.

It is true that admissions made by attorneys for their clients are sometimes admissible against the client where they are made by the attorney for the express purpose of waiving or obviating the necessity of formal proof and the other party has relied upon the admission. In this case, however, the amended

answer subsequently denied the delivery of this stock within the dates mentioned, so that it cannot be claimed that plaintiff was in any wise misled by any supposed concession or admission previously made by attorneys for the defendant; and we think it is generally true that a formal stipulation or admission made by attorneys for a party for some collateral purpose is not admissible as proof of any fact therein stated upon the trial of the case, particularly where the issues are made up subsequently thereto.

*Murray v. Chase,* 134 Mass. 92.

We believe the rule is also settled in the Federal Courts that prior pleadings in a case which are not sworn to by the party but signed only by the attorneys, are not admissible on the trial as evidence against the client, upon the issues made by the amended pleadings.

In the case of *Delaware County v. Diebold Safe Co.,* 133 U. S. 473, 487, a former complaint in the action, not under oath or signed by the parties themselves, but by the attorneys, was offered in evidence as an admission of certain facts therein contained, and in sustainig the ruling of the Court below in rejecting the evidence, the Court said:

"The former complaint, not under oath, nor signed by the plaintiff, but only by its attorneys, was clearly incompetent to prove an admission by the plaintiff that upon those facts it had not a cause of action against this defendant. *Combs v. Hodge,* 21 How. 397; *Pope*

*v. Allis,* 115 U. S. 363; *Dennie v. Williams,* 135 Mass. 28."

In all of these cases it is expressly held that pleadings in another case or original pleadings in a case where pleadings are subsequently amended, are not admissible as admissions against the party unless they are sworn to or signed by the party himself or there is other evidence to show that the client in some way approved the admission made by the attorneys in the pleading.

The stipulation offered in evidence in the present case relating to former pleadings is not sworn to, but signed by attorneys only, and there was no offer of any evidence to show that the client had any knowledge that the stipulation was ever entered into by the attorneys; nor is there any evidence that the matters contained in the stipulation were ever actually embodied in any former pleading filed in the case. Under the Statutes of Washington all pleadings must be verified, and the matters contained in this stipulation could not have been embodied into any pleading so as to become a formal pleading in the case without the verification required by the statute.

We insist further, however, that even if this document was technically admissible, it had no material bearing upon the issues in the case. The board of trustees of the defendant company, on September 5,

1906, authorized a subscription to be made by that company for $125,000 preferred stock of plaintiff. This stock was paid for by applying the $75,000 previously turned over to plaintiff by Rosene, or under his instructions, and by the additional credit of $50,000 made upon the account of the plaintiff with the defendant on September 5, 1906. When Rosene was in New York in October thereafter, this arrangement was expressly assented to by the president and treasurer of the plaintiff and by all of its directors, with the possible exception of one. The defendant thereupon became immediately entitled to receive from the plaintiff $125,000 of its preferred stock. An admission, therefore, that it did receive that amount of stock from the plaintiff prior to November 9, 1906, had no tendency to show a ratification of the Rosene subscription of April, 1906, for $250,000. This is particularly true in view of the statement in the stipulation that the 25,000 shares of stock of plaintiff which defendant received represented the stock which had been paid for by the $125,000 which Rosene had paid out of defendant's funds to plaintiff. The testimony shows that $50,000 of that amount was paid after the board meeting of September 5, 1906, showing conclusively that any admission of the receipt of stock paid for by that money must have referred to a receipt subsequent to September 5, 1906.

The testimony introduced upon the trial of the cause shows conclusively that the admission which the attorneys for the defendant proposed to make in this stipulation was inadvertent and not true in fact. The original certificates received by the defendant were introduced in evidence. They are tabulated on page 73 of appellant's brief. They were apparently issued at various times to A. A. Hauseman & Co. and were not assigned to the defendant until September 24, 1907. Therefore, the statement in the stipulation that between April 4, 1906, and November 9, 1906, "plaintiff issued to, and defendant accepted, 25,000 shares of the preferred capital stock of plaintiff" is manifestly incorrect.

In this connection, the appellant in his brief refers to Exhibit "N," being a letter dated April 18, 1906, from Rosene to Henderson, requesting Henderson to obtain 12,000 shares of the preferred stock from the plaintiff company and send to Rosene. Rosene apparently contemplated that the shares of stock would be issued to him, crediting the amount thereof on the $245,000 due him for the mining property. There is nothing to indicate that this stock was issued to Rosene as requested, and, in any event, Rosene testified that this letter was written without the knowledge of the defendant's board of trustees. (Record, p. 69.)

The certificates themselves which were produced

on the trial show that they were not issued to the defendant or to Rosene. Reference is also made by appellant, on page 75 of his brief, to Exhibit Number 3, which was a letter from Hartman, attorney for defendant, to the company, giving form of letter to be sent by the secretary of the company to the plaintiff, notifying the plaintiff of the action of the defendant's board on April 10, 1907, reaffirming its repudiation of Rosene's subscription. Mr. Hartman in writing the letter was apparently under the impression that the $125,000 of stock authorized by the resolution of the board of trustees on September 5, 1906, and paid for in full at that time by the arrangement then made, had actually been issued to the defendant company. In this matter he was apparently in error, but in any event, the stock he refers to, whether it had been issued or not, was the stock authorized by the resolution of September 5, 1906. In the same connection, in appellant's brief, reference is made to a resolution of defendant's Executive Committee on September 18, 1907, directing that proxies be sent to Mr. Eccles to represent the company and to have the stock owned by the company re-issued in its name. Evidently this also refers to the stock authorized in the September 5th resolution.

Taking the record as a whole, it is manifest that all references made in any of the minutes of the com-

pany to any stock owned by it in the plaintiff, and all references made in either the letter dictated by Hartman or in the stipulation relating to the amendment of the pleadings, had in mind the stock authorized by the board in September, 1906. Whether that stock was actually issued to the defendant prior to November 9, 1906, is immaterial. Any admission that it was so issued would have no probative force in proving ratification by the defendant company of the Rosene subscription of April, 1906, for $250,000.

We, therefore, submit, first—that the stipulation offered in evidence was not admissible because not sworn to or signed by the defendant; and, second—that even if it was admissible, its rejection was not prejudicial to the plaintiff.

III.

Error is assigned upon the ruling of the Court sustaining the objection of appellee to the introduction of evidence of the minutes of the Executive Committee of appellee of October 23, 1907 (Record, p. 63). The record does not set out these minutes and it is, of course, impossible for the Court to determine whether the ruling of the Court in excluding them was correct or not. The appellant in his brief and in his assignment of error (p. 198) sets forth what purports to be a copy of these minutes. We submit, however, that neither the assignment of error nor the appel-

lant's brief can be used to supplement defects in the record.

*Jones v. Buckell,* 104 U. S. 556.

The record itself should have shown the evidence if he contemplated assigning error thereon.

If the minutes were as set out by appellant in his brief, however, it is perfectly manifest they were wholly irrelevant and immaterial to any issue in this case. The fact that the Executive Committee requested that Mr. Rosene be asked to resign his office as president in October, 1907, can have no possible bearing upon his authority to make this subscription, or upon the question of ratification or repudiation thereof by the board in 1906.

IV.

Error is assigned upon the action of the Court in over-ruling the objection of appellant to the question alleged in the assignment to have been put by the appellee to the witness H. W. Treat, the question and answer being copied in the assignment. No such question or answer appears in the record. On page 93 of the record, in the testimony of Treat, appears the following:

"That the defendant's board of trustees, at any meeting attended by witness, did not authorize Mr. Rosene to subscribe for stock in plaintiff company, prior to the board meeting of September 5, 1906."

That is the only reference found in the record to the matter referred to in this assignment of error. The Court will observe that the record shows that no objection was made by the appellant, nor ruling of the Court invoked, nor any exception reserved. There is manifestly nothing in this testimony upon which the appellant can base an error.

V.

Error is assigned upon the action of the Court over-ruling the objection of appellant to the following question put by appellee to the witness Treat on direct-examination, to-wit:

"State what took place before the board at the time when those resolutions were adopted."

The matter referred to is found on page 95 of the record. Objection was made to the question upon the ground of incompetency alone. Appellant has not discussed this assignment of error in his brief, and we, therefore, assume that he is not relying upon it. The meeting of the board referred to was the meeting of September 5, 1906, at which a resolution was passed authorizing the president to subscribe for $125,000 of stock of the company. The resolution recites that:

"The question of Mr. Rosene's subscription to the stock of the Northwestern Development Company was fully discussed and Mr. Thomsen introduced the following resolution, etc."

The appellant himself had previously interrogated his witness Thomsen as to what had occurred at this meeting (Record, pp. 73-74). It was, therefore, competent for the appellee by its own witnesses to show its version of what occurred at the meeting. Aside from this, however, the resolution itself recites that a general discussion took place, which resulted in the resolution offered by Mr. Thomsen and adopted by the board.

It was manifestly competent for the appellee to show the facts and circumstances connected with this resolution. The testimony was not offered to contradict the record, but to explain the nature of the discussion referred to in the record, and the circumstances surrounding the action of the board.

*Tibballs vs. Company,* 10 Wash. 329.

Even if the ruling was technically incorrect, it is manifest that the answer of the witness was in no wise prejudicial to the appellant. He stated in substance what had previously been stated by appellant's own witness Thomsen on direct and cross-examination and without objection by either side.

VI.

Error is assigned upon the action of the Court in over-ruling the objection of appellant to the question put by appellee to its witness Trenholme (Record, pp. 103-4). The witness was asked:

"Did the board of trustees at any time ratify any subscription made by Mr. Rosene to the capital stock of plaintiff outside of the subscription authorized at that meeting of September 5, 1906?"

The witness had already testified that he had attended all of the meetings of the board between the middle of March and the 5th of September, 1906. It had also already appeared that at one of these meetings, held in April, no minutes were made of the proceedings. The minutes of the appellee's board were in Court at the time this question was asked, and it had been shown that there was no entry upon the minutes of the board showing any ratification or in any wise referring to this Rosene subscription, except the minutes of September 5, 1906, and the minutes of April 10, 1907. The appellee desired and evidently was entitled to show that the board of trustees of the appellee company had not at any time ratified the subscription of Rosene. It already appeared that the board had not ratified by any resolution appearing upon its minutes. The question was intended to show further that the board had not ratified the subscription at any time. Appellant makes this admission (page 71 of Brief):

"What the board did, whether of record or not, was a pertinent inquiry; but the question as framed called for the conclusion of the witness and was objectionable on that ground alone; further it was objectionable on the ground of not being the best evi-

dence; for the minutes are the record of the transactions of the board and the best evidence of those transactions."

Whether the board had in fact ratified the subscription was a question of fact. There might be a course of conduct on the part of the appellee in its business dealings and transactions with the appellant which would be held in law to be an acquiescence in or ratification of the subscription, and be binding as such upon the appellee; but the question put to this witness was whether the board of trustees had ratified the subscription. As stated above, the minutes were present, and it affirmatively appeared that no such ratification appeared upon the minutes. There was no way open to the appellee to prove affirmatively that the board of trustees had not ratified the subscription except to prove it by some competent witnesses who had been present at all of the meetings of the board. The question, manifestly, did not call for any conclusion of the witness, but for the fact. If the question had been whether the appellee had by affirmative action or otherwise ratified the subscription, the question might have been open to the objection now raised; but as the question related to action by the board of trustees, who can only act when meeting as a board, the objection was manifestly untenable. The board could act only when in session as a board. The witness had testified that he was present at all of these

meetings. Any action by the board would be a positive action either ratifying or repudiating the subscription, and whether it had done the one or the other at any of these meetings attended by the witness was a question of fact.

VII.

Error is assigned upon the action of the Court over-ruling the objection of appellant to the question put by the appellee to its witness Trenholme as to whether he had notified the president of the appellant of the action of the board of trustees of the appellee company at its April meeting in repudiating the Rosene subscription (Record, p. 105). The contention made by the appellant is that notice to Davis under the circumstances was ineffective, for the reason, as it is claimed, that the main office of the appellant company was in New York, and Davis, its president, being in Seattle at that time, was presumably not here on the business of his company, and that notice to him under those circumstances would not be notice to the company. The objection made by appellant to the question was upon the sole ground that it was incompetent. We do not think that the objection is sufficiently definite to raise the question discussed by appellant in his brief (p. 41).

It appears from the record that the appellant company was organized under the laws of the State of

Maine and that its board of directors had an office and place of meeting in New York; that the appellant also had an office in Seattle, where a large part of its business was transacted, consisting of the purchase of goods and the shipments to Alaska; and, further, that its main business transactions were carried on in Alaska. Davis was president of the company and resided in New York. He was in Seattle at the time of this interview and had been here for some little time. It was certainly competent for the appellee to prove that the president of appellant company was notified of the action of the board of trustees of the appellee company in repudiating the Rosene subscription. If the objection to the question was intended to be based upon the claim that Davis, although president of the appellant company, was in Seattle at the time on personal business not connected with his company, and therefore the notice to him would not be notice to the appellant, the objection should have disclosed that ground. The objection to the question on the ground of incompetency does not raise that question at all. If appellant had indicated that his objection was based upon that ground, the appellee could or might have been able to meet the objection by proof that Davis was here on business of his company.

*Choctow etc. Co. v. McDade,* 191 U. S. 64;
*Moore v. Bank,* 13 Pet. 302;
*U. S. v. McMasters,* 4 Wall. 680;

*Evanston v. Gunn,* 99 U. S. 660;
*Atkins v. Elwell,* 45 N. Y. 753;
*Nofts v. Smith,* 32 N. E. 1024;
*McKaisie v. Association,* 53 S. W. 1107.

If notice to Davis was not notice to his company because of the fact that he was disassociated from his company at the time, an objection would be upon the ground of the materiality of the evidence rather than upon the ground of its competency.

It is manifest, however, that the objection, even if made upon the ground now argued by appellant in his brief, was not well taken. It was not a case where an agent of a company, when away from the place of business of the company, and on his own business or pleasure, incidentally acquired knowledge of some fact, which he might or would forget before he could report it to his company. On the contrary, Davis was presumably in Seattle on the business of his company, because a large part of the company's business was transacted in Seattle. There is nothing in the record indicating that he was in Seattle on any other business. The notice given to him was direct notice of the action of the board in repudiating this subscription. He was the proper officer to receive such notice. It appears from other parts of the record that Davis communicated this knowledge to other officers of the appellant company, and Rosene testified that when he held his conference with the officers and directors of

the appellant company in the succeeding October, he found that they all had notice prior to that time of the repudiation of this subscription (Record, pp. 134-5).

VIII.

Error is assigned upon the refusal of the Court to give instruction Number 16, as requested by appellee. This error cannot be considered by this Court, for the reason that this alleged instruction Number 16, as requested by appellant, does not appear in the record at all. The record (p. 191) shows that after the Court had given his general instructions, the appellant's attorney requested him to give instruction Number 16, as filed by the appellant. Whereupon, the proceedings as shown by the record were as follows:

"THE COURT: The plaintiff requests me to give this instruction. This is in substance what I have stated to you, but I will read it.

The plaintiff had the legal right to issue all of its common stock to John Rosene in part consideration of the conveyance by Rosene to it of certain mining properties and water rights, provided that all of its then stock subscribers concurred therein. And if you find that all of plaintiff's common stock was issued to John Rosene for such properties, with the concurrence of all its then stock subscribers, and all of the holders of its capital stock then outstanding—I will modify that—provided they acted in good faith in the matter and were not guilty of actual fraud in the transactions as I have already instructed you, then such issue was legal.

MR. GORHAM: We desire now to note an exception if the Court please, for the failure to give particularly instruction number 16 as among the requests of the plaintiff."

That is the entire record. It is inferable from the language used by the Court that a part of the instruction as there given by him was instruction number 16, requested by appellant, and that the Court modified the instruction as requested in some respect; but it is impossible to say that that modification was error, or that there was some other part of the instruction which should have been given, in the absence of any showing in the record as to what the instruction requested was.

Appellant has sought to incorporate the supposed requested instruction Number 16 into the record by including it in his assignment of error Number VIII (Record, p. 199). Manifestly, however, this assignment of error is no part of the record of the proceedings before the Court and the Court cannot consider the propriety of a requested instruction which does not appear in the record, but is shown only in the assignment of errors.

> *Dunlop v. Monroe*, 7 Cranch 242,
> *Jones v. Buckell*, 104 U. S. 556.

IX.

The remaining assignments of error numbered IX to XVII, inclusive, seek in various forms to raise the question whether there was substantial evidence to sustain the verdict of the jury.

We respectfully submit that these assignments present no question of law for review by this Court. There was no exception taken by the appellant to the instructions of the Court to the jury. There was no challenge of the sufficiency of the evidence to establish these defenses by a request for a peremptory instruction for a verdict in favor of the appellant or by either request for an instruction or a motion to take either of the affirmative defenses from the jury. The record shows no motion for a new trial based upon the evidence.

In the recent case of *Dunsmuir v. Scott,* 217 Fed. 200, this Court held that in the absence of some challenge as to the sufficiency of the evidence by a motion to withdraw the case from the jury, or for a peremptory instruction, the Appellate Court was limited to a review of the rulings of the Court to which exceptions were reserved during the progress of the trial, and could not consider whether as a matter of law the evidence was sufficient to sustain the verdict of the jury. We, therefore, submit that these assignments of error present no question for this Court.

X.

The appellant (Brief, p. 94) has submitted a rather elaborate argument justifying the issuance of bonus stock by corporations, and contends that the case of the *Old Dominion Copper M. & S. Co. v.*

*Lewisohn,* 210 U. S., holds that such issues are legal when consented to by the corporation itself and all of its stockholders at the time the stock was issued. That case holds that where a corporation issues stock in payment for property, with the knowledge and consent of all of its officers and stockholders, the corporation itself cannot subsequently maintain a bill in equity to rescind the transaction upon the ground that the property was not of a value equal to the par value of the stock, even though there has been a change in the personnel of the stockholders between the time of the issuance of the stock and the time of the commencement of the action. In other words, the Court holds that where a corporation and all of its stockholders entered into a contract for the purchase of property to be paid for by the issuance of its stock, the transaction is valid as between the parties and that a subsequent change in the personnel of the stockholders does not vest the corporation with the right to rescind what it had previously assented to.

A corporation unquestionably derives its powers from the laws of the state in which it is incorporated. If the laws of the State of Maine had denied corporations organized under the laws of that state the power to issue capital stock in payment for property, we apprehend that no one would claim that an executory contract made by a corporation with a third party to

issue stock to that party in payment for property would be enforceable by the corporation.

Section 50 of Chapter 47 of the Statutes of Maine of 1904 authorizes a corporation to purchase property and to issue stock "to the amount of the value thereof in payment therefor."

Section 87 of the same statute imposes a restriction or limitation upon the power of a corporation to issue stock in payment of property, by declaring that the capital stock shall be and stand for the security of all creditors and "no payment upon any subscription to or agreement for the capital stock of any corporation shall be deemed a payment within the purview of this chapter unless bona fide made in cash, or in some other matter or thing, at a bona fide and fair valuation thereof."

The power of a Maine corporation to issue stock in payment for property, so that the stock will not be liable thereafter at the instance of the creditors of the corporation, is qualified and limited by these statutes.

> *Glenn v. Liggett,* 135 U. S. 523,
> *Giesen v. Company,* 102 Fed. 584.

There is nothing in the decision in the *Old Dominion Copper* case indicating a purpose to over-rule *Glenn v. Liggett,* and the many cases subsequently decided following that decision.

The subscription contract sued on in this case was treated by both the appellant and the Court as requiring the appellant to issue to the appellee full paid and non-assessable common stock for each share of preferred stock paid for by the appellee. In the amended complaint, appellant alleged that it was able, ready and willing to issue and deliver to the appellee full paid, non-assessable shares of common stock. In order to emphasize this offer, the complaint alleges facts tending to show that 500,000 shares of the common stock were issued to Rosene in payment for property, upon a bona fide and fair valuation by the board of directors, and that after the stock had been thus paid for in good faith, as required by the Maine Statute, the stock was returned by Rosene to the treasury of the appellant company, and was available for issuance to the appellee in compliance with the subscription contract.

The fifth affirmative defense in meeting these allegations of the complaint denied that the shares of common stock referred to had been paid for as required by the Maine Statute, and alleged that the board of directors of the appellant, at the time the stock was issued to Rosene, did not make any bona fide and fair valuation of the property, and that the property in fact was not of a value equal to the par value of the stock so issued. Appellant did not raise any question

of law as to the sufficiency of this answer, but replied by general denials, and pleaded certain facts by way of estoppel.

When the case came on for trial before the jury, the evidence as to all of these transactions thus pleaded in both the complaint and fifth affirmative defense was introduced without objection, and the Court instructed the jury fully on the issue therein involved, and no exception was taken by the appellant to these instructions. If, as is now contended by the appellant, it was his theory that the issuance of this stock to Rosene under the facts alleged in the fifth affirmative defense amounted to a payment for the stock, irrespective of the question of the good faith of the directors in the valuation of the property, and that the appellee should legally be required to accept such stock under the terms of the last clause of the subscription agreement, he should have presented these legal propositions in the Court below in some form, and reserved an exception to any adverse ruling of the Court thereon. He is now virtually asking this Court to review the correctness of the instruction of the Court below on the question of the bona fides of the payment of this stock, without having made any objections to the instruction or reserved any exceptions thereto.

It seems manifest that the question as presented in this case is an entirely different question from that

presented in the *Old Dominion Copper* case. The specific question involved in the case at bar was involved in the case of *Trent Import Co. v. Wheelwright,* 84 Atl. 543. In that case, the subscription contract to preferred stock provided that an equal amount of common stock should be issued by the corporation to the subscribers. All of the common stock was issued by the corporation to one of its promoters, ostensibly in payment for certain property conveyed by him to the corporation. He thereupon turned over the requisite amount of the common stock to the treasurer of the corporation to be issued to the preferred subscribers as a bonus. The corporation was organized under the laws of New York. The statutes of that state provided that corporations shall issue stock only for money, or in payment for labor done, or for property actually received for the lawful purposes of the corporation. A subscriber for the preferred stock upon being sued in Maryland upon a subscription contract, pleaded as a defense facts substantially identical with the facts pleaded in the fifth defense in the present case. The trial Court submitted the case to the jury to determine whether the common stock tendered by the corporation in fulfillment of the subscription contract had been paid for to the corporation in property fairly valued by the corporation board at the face value of the stock. The jury returned a verdict in favor of the defendant. The Supreme Court of Maryland held

that the defense was a good defense and upheld the judgment of the trial Court.

XI.

Appellant has submitted an argument upon the question of ratification by appellee and estoppel (Brief, p. 108), which does not seem to be based upon any assignment of error. As we have previously stated, the Court below submitted to the jury the question whether, upon all the evidence, the appellee had ratified the Rosene subscription either expressly or by acquiescence and conduct. No exception was taken to this instruction, and of course no question of law is presented for review.

On pages 37 to 50 of appellant's brief, there is submitted an argument upon the facts in an attempt to show that the Rosene subscription was not disaffirmed or repudiated by the appellee.

We do not deem it necessary to trouble the Court with an elaborate discussion of the evidence. The witnesses, Hartman, Treat and Trenholme, testified positively that the board did specifically and expressly repudiate the subscription by resolution offered and unanimously passed by the board in April, 1906. Any finding of the jury to the contrary would have been set aside because not supported by the evidence. The question of the weight or sufficiency of the evidence

as matter of law was not reserved by any objection or exception in the Court below.

XII.

Finally, we submit that upon the undisputed facts in the record the appellant was not entitled to recover. The capital stock of the appellant was fixed by its Articles of Incorporation at $6,250,000, being $2,500,000 preferred stock and $3,750,000 common stock. The testimony shows that out of the $2,500,000 of preferred stock, only approximately $1,600,000 par value was ever subscribed for. (Record, p. 62.)

We think it is settled by the overwhelming weight of authority that no recovery can be had either upon a subscription contract or upon an assessment by the corporation itself for an unpaid subscription unless all of the stock has been subscribed for. It is an implied condition in all subscriptions to the capital stock of corporations that a subscription agreement shall not become binding until the full amount of capital stock has been subscribed.

In the case at bar, the subscription agreement, which is made an exhibit to the complaint, recites that the capital stock of the corporation consists of $2,500,000 preferred stock and $3,750,000 common stock. Manifestly, anyone signing this subscription agreement contemplated becoming a member of a corporation hav-

ing a capital stock of $6,250,000. He might conceivably be willing to take stock in a corporation providing itself with ample capital to carry on its contemplated business, when he would not be willing to become a stockholder in a corporation whose articles provided for a less capital than he deemed to be ample for the success of the business. The rule that it is an implied condition in all subscription agreements that the full amount of the capital stock must be subscribed, is laid down by the following, among other, authorities:

*Converse v. Gardner G. Co.,* 174 Fed. 31,
*Masonic Temple etc. v. Channell,* 43 Minn. 353,
*Eaton v. Pacific National Bank,* 144 Mass. 260,
2 *Clark & Marshall on Corporations,* Sec. 505,
2 *Thompson on Corporations,* Sec. 1724,
26 *A. & E. Ency. of Law,* 934,
10 *Cyc.,* 399.
*Rockland etc. Co. v. Sewall,* 14 Atl. (Me.) 934,
*Penobscot Ry. Co. v. Dummer,* 40 Me. 172,
*Morgan v. Landstreet,* 109 Md. 558.

In this latter case, the court stated the rule as follows:

"Where the capital stock and the number of shares are fixed by the act, or certificate, of incorporation as in the present case, no assessment can be lawfully made on the share of any subscriber until the whole number of shares has been taken."

We quote from the opinion also the following statement:

"It is sufficient that the Maryland rule is as stated, but, as indicating its soundness and universality, it may

be stated that it prevails in New York, Missouri, Connecticut, New Hampshire, Wisconsin, Iowa, Georgia, California, Illinois, Maine, Tennessee, Ohio, and generally throughout the United States."

In an annotation to this case, reported in 16 *A. & E. Ann. Cases,* 1253, the rule is stated as follows:

"The general principle is settled by the American authorities that where the amount of the original stock of a corporation is specified in the charter, articles of association, or contract of subscription, and there is nothing disclosing a different intention, a subscription to such stock is made upon the condition that the whole amount thereof shall be subscribed by *bona fide* subscribers,"

and among the large number of cases cited from all of the states by the annotator in support of this statement of the rule, he gives the following from Maine:

> *Oldtown etc. R. Co. v. Veazie,* 39 Me. 571,
> *Lewey's Island R. Co. v. Bolton,* 48 Me. 451,
> *Somerset R. Co. v. Clarke,* 61 Me. 379,
> *Belfast R. Co. v. Cottrell,* 66 Me. 185,
> *Skowhegan etc. R. Co. v. Kinsman,* 77 Me. 370,
> *Rockland etc. Co. v. Sewall,* 80 Me. 400.

It is shown by Kellogg, appellant's witness, that the total subscription to the preferred stock aggregated approximately one million six hundred odd thousand dollars, and that the entire preferred stock had never been subscribed for (Record, p. 62). If the rule which we contend for applies to Maine corporations, then it is apparent from appellant's own showing that he is not entitled to recover.

It is due to the Court to state that the Court below had held in his rulings settling the pleadings (which rulings are not brought up in this record) that the rule contended for did not apply to Maine corporations. Of course, we are not appealing from that ruling; but if the case is to be tried as an appeal in equity, and is to be disposed of upon its merits, we submit that the appellant is not entitled to recover, where the record affirmatively shows that the entire capital stock had not been subscribed for, and there has been no waiver of that implied condition.

Respectfully submitted,

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